SOAH DOCKET NUMBER 582-09-2005
TCEQ DOCKET NO. 2009-0033-AIR

IN THE MATTER OF	§	BEFORE THE STATE
THE APPLICATION BY	§	
LAS BRISAS ENERGY	§	OFFICE OF
CENTER LLC FOR	§	
PERMIT NOS. 85013,	§	ADMINISTRATIVE
HAP48, PAL41, AND	§	
PSD-TX-1138	§	HEARINGS

TEXAS CLEAN AIR CITIES COALITION'S REPLY TO EXCEPTIONS

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (the Commission)[1]:

The Texas Clean Air Cities Coalition (the "Cities") respectfully files this reply to (a) the Executive Director's (the "ED") Exceptions to the Administrative Law Judges' Proposal for Decision and (b) Applicant Las Brisas Energy Center LLC's ("LBEC" or "Applicant") Exceptions to the Administrative Law Judges' Proposal for Decision ("PFD"). The Cities adopt the replies of the other protesting parties and respectfully urge as follows:

I. Contrary to what the ED contends, no statute or rule required the assistance the ED gave the Applicant.

A. The ED unquestionably assisted the Applicant.

No legitimate question can exist as to whether the ED assisted the applicant in carrying its burden of proof at the hearing. The ED's own air modeler, Mr. Daniel Jamieson, testified as follows:

Q. My only question is, in your role with the [ED], if in reviewing the modeling that had been submitted [by the Applicant] on July 15th, 2010, whether or not you would have been able to make a determination, without making any adjustments or differences or updates, that, in fact,

[1] In light of the Environmental Protection Agency's December 21, 2010 letter to the Commission (Exhibit A hereto), the Cities object to the Commission's taking jurisdiction of this permit application proceeding. Further, the Cities object to the granting of the permit until such time as the Applicant amends its application to include a greenhouse gas impacts analysis and the EPA reviews and approves any such analysis.

the applicant had sufficiently shown that there was no violation of the 24-hour PM_{10} PSD increment?

A. .... *Without making any of the updates that I made and with the inconsistencies and deficiencies I saw [in the Applicant's modeling], I would say, no, that it was not a sufficient demonstration.*[2]

Similarly, the ED's own permit engineer, Mr. Randy Hamilton, testified as follows:

Q. Mr. Jamieson went through additional steps that were beyond what the applicant had done. Right?

A. Right.

Q. And his additional steps corrected the problems in the applicant's modeling here. Correct?

A. They -- that's correct.

Q. And after the additional modeling that Mr. Jamieson did, it is now the executive director's position that the permit can be granted. True?

A. Yes.

Q. And as we saw, *the additional work that Mr. Jamieson did was a necessary part of getting the executive director's approval of the proposed permit. Correct?*

A. Correct.

Q. *So would you agree that Mr. Jameson's additional work was a benefit to the applicant?*

...

WITNESS HAMILTON: *Insofar as it furthers the applicant's potential to get their permit, yes.*[3]

For its part, LBEC now incredibly contends that it can meet its burden by "post-processing" Mr. Jamieson's additional work.[4] LBEC accordingly contends that it met its burden when its expert Mr. Ellis testified based on Mr. Jamieson's additional work.[5] To accept this contention would lead to the absurd conclusion that the ED could do all the modeling, then the applicant could carry its burden merely by "post-processing," that is, adopting, the ED's work.

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[2] Transcript Vol. 12 (Oct. 20, 2010), 2882:18-2883:6 (Jamieson response to question by Judge Bennett) (emphasis added).
[3] Transcript Vol. 13 (Oct. 21, 2010) 3099:1-20 (emphasis added).
[4] LBEC Exceptions at p. 26.
[5] *Id.*

Such adopting of the ED's work, however, would undoubtedly constitute "substantial assistance" by the ED and thereby violate TWC § 5.228(e).

B. 30 TAC § 80.127(h) does not justify the ED's assistance to the Applicant.

The ED does not deny – nor, in light of the above testimony from its own witnesses, could it deny – that its own actions assisted the Applicant in carrying its burden of proof at the hearing. Rather, the ED contends that it was somehow "required" to assist the Applicant. That contention, however, is wrong.

The ED argues primarily that its assistance to the Applicant finds justification in 30 TAC § 80.127(h). The relevant portion of § 80.127(h) reads as follows:

> [T]estimony or evidence given in a contested case permit hearing by agency staff ... relating to ... any analysis, study, or review that the [ED] is *required by statute or rule to perform* shall not constitute assistance to the permit applicant in meeting its burden of proof."[6]

As demonstrated below, no statute or rule required the ED to assist the Applicant here.

1. The EPA's Workshop Manual does not satisfy the requirements of 30 TAC § 80.127(h).

The ED, in trying to fit its assistance into the exception afforded by 30 TAC § 80.127(h), points primarily to an EPA workshop manual.[7] For several reasons, however, that argument fails.

In the first place, § 80.127(h) expressly refers to a requirement by "*statute or rule*." An EPA workshop manual, however, is not a "statute or rule." Therefore, the ED cannot rely on an EPA workshop manual to escape the Legislature's prohibition of the ED's giving an applicant any assistance.

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[6] 30 TAC § 80.127(h) (emphasis added).
[7] *See* ED's Exceptions at pp. 4-6 & n. 9.

Second, the EPA workshop manual – even if relevant, which it is not – refers only to a "verification of the demonstration."[8] By contrast, what the ED did here went far beyond a "verification" of the Applicant's demonstration. Instead, the ED, after finding the "inconsistencies and deficiencies" in the Applicant's "demonstration",[9] went further to adjust and correct the Applicant's air modeling.[10]

In addition, the ED's own Exceptions make clear that the EPA workshop manual's guidance itself did not require the ED's actions here. Rather, the guidance merely states that the can state "*may*" approve an application upon a "verification of the demonstration."[11] The ED admits that "EPA does not further elaborate on the demonstration element in its guidance."[12] In other words, according to the ED, even the EPA workshop manual remains ambiguous about what the permitting agency may do. Simply put, the EPA manual itself does not *require* anything.

The ED's Exceptions go on to mention how the ED has "historically interpreted" what "to verify the demonstration" means.[13] As the ALJs found, however, "ordinarily, once a deficiency is found in an applicant's modeling, [the ED's] review stops until the applicant has satisfactorily addressed the concerns by offering additional information or modeling."[14] Moreover, the ED's "historical interpretation" amounts to nothing more than that – an interpretation, not a "requirement."

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[8] Exhibit ED-4, p. C-52 (bates p. 284).
[9] Transcript Vol. 12 (Oct. 20, 2010), 2882-83 (Jamieson testimony).
[10] As Mr. Hamilton testified:

> Q. *[Mr. Jamieson's] additional steps corrected the problems in the applicant's modeling here. Correct?*
> A. They -- *that's correct.*

Transcript Vol. 13 (Oct. 21, 2010), p. 3099 (emphasis added).
[11] *See* n. 8 *supra.*
[12] ED Exceptions at p. 5.
[13] *Id.* The ED's Exceptions contain no cite supporting this "historical interpretation."
[14] PFD (Dec. 1, 2010) at p. 26.

The Cities find no small irony in the fact that the State of Texas has refused to follow the EPA's clear rules on greenhouse gas emissions, yet in this proceeding claims that some ambiguous language in an EPA workshop manual somehow required the ED to assist the Applicant here. As Mr. Hamilton testified:

> "[W]e have disagreements with the EPA. *We're not necessarily going to follow everything they tell us.*"[15]

Mr. Hamilton even admitted that the language in the EPA workshop manual that the ED now claims "required" Mr. Jamieson's corrective modeling amounted to nothing more than mere "guidance."[16]

2. TWC § 5.228(a) does not justify the ED's rendering assistance to an applicant.

In a last-ditch effort, the ED argues that TWC § 5.228(a) required it to assist the Applicant by submitting Mr. Jamieson's corrective air modeling. Section 5.229(a), however, is merely procedural – the ED shall present its position at a hearing – and cannot justify the ED's violation of § 5.228(e) by assisting an applicant meet its burden of proof at a hearing. Further, any such interpretation of § 5.228(a) would swallow the rule and legitimize any assistance given the applicant under the guise of having to present such assistance at a hearing.

II. The Applicant's additional arguments fail

The Applicant's Exceptions make a couple of additional, yet equally erroneous, arguments. For example, the bulk of the Applicant's Exceptions depends on misreading TWC § 5.228(e) to say that it merely prohibits the ED's assisting an applicant during a hearing. The statute, however, says no such thing.

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[15] Transcript Vol. 13 (Oct. 21, 2010), p. 3106 (emphasis added).
[16] *Id.*

A. § 5.228(e) prohibits the ED from assisting an applicant meet its burden of proof and does *not*, as LBEC suggests, limit the time period when such assistance is improper.

Section 5.228(e) reads as follows:

a. The law forbids the ED from assisting the applicant carry its burden of proof.

The executive director ... may not assist a permit applicant in meeting its burden of proof in a hearing before the commission or *the State Office of Administrative Hearings* ....[17]

The phrase "in a hearing before [SOAH]" modifies "burden of proof" and merely describes the type of proceeding in which the applicant has such burden of proof. LBEC, however, would turn the statute on its head and have the phrase "in a hearing before [SOAH]" limit the time period in which the ED's assistance is improper.

The Texas Legislature, had it wanted to say that at some times it would be fine for the ED to assist the Applicant, would have placed the "in a hearing before [SOAH]" phrase at the beginning of § 5.228(e). The Legislature did not do that. Instead, the plain reading of the statute forbids the ED – at *any* time – from assisting the applicant in meeting its burden of proof in a hearing before SOAH.

In short, what the ED did here would have assisted the Applicant in meeting its burden of proof in the hearing before SOAH. Such assistance was improper and correctly found so by the ALJs. LBEC's reading of § 5.228(e) is absurd and would allow the ED to do all the work for a permit applicant, so long as that work did not occur during a hearing.

B. Section 5.228(e), even if read as LBEC would read it, prohibits what the ED did here.

[17] TWC § 5.228(e) (emphasis added).

As just established, § 5.228(e) prohibits the ED from assisting the Applicant at any time – not just during a hearing before the Commission or SOAH. Nevertheless, even misreading the statute the way LBEC does, the ED assisted LBEC during the hearing.

Specifically, the ED introduced Mr. Jamieson's corrective modeling at the hearing.[18] Further, Mr. Hamilton testified at the hearing that, based on Mr. Jamieson's corrective modeling, the ED could recommend the granting of the permit:[19]

Q. [Based on that guidance *in ... conjunction with Mr. Jamieson's second modeling audit, what is your conclusion about whether the TCEQ may approve this permit application?*

A. *My conclusion is that the TCEQ may issue the permit application ... on this basis.*

* * *

Q. *[T]he additional work that Mr. Jamieson did was a necessary part of getting the executive director's approval of the proposed permit. Correct?*

A. *Correct.*

Therefore, even *during the hearing*, the ED introduced and based its recommendation on Mr. Jamieson's corrective modeling. These acts clearly constituted improper substantial assistance by the ED to the Applicant."

C. LBEC's Exceptions mischaracterize what the ALJs said the ED should have done.

LBEC's Exceptions open with an argument that it met the ALJs' standard, which LBEC describes by saying that Jamieson, after finding the applicant's modeling acceptable, could

[18] ED Exhibit 51 was Mr. Jamieson's "audit memo" that contains the additional, corrective modeling that he did. Transcript Vol. 12 (Oct. 20, 2010), p. 2789. The ED offered its EX-51, whichwas admitted. *Id.* at p. 2797-98.
[19] Transcript Vol. 13 (Oct. 21 2010), pp. 3034 & 3099 (emphasis added); *see also* Transcript Vol. 12 (Oct. 20, 2010), pp. 2794-95 (Jamieson testimony).

properly have proceeded to address the state's SIP concerns.[20] This argument, however, mischaracterizes both what the ALJs held and what Mr. Jamieson did.

In the language LBEC quotes from the PDF, the ALJs were referring to the air modeling LBEC submitted on the remand for the second hearing, not the air modeling it submitted from Mr. Kupper "at the outset ... before a draft permit was issued."[21] Nevertheless, the testimony that LBEC quotes in which Mr. Jamieson allegedly approved LBEC's air modeling occurred at the original hearing in November of 2009. Moreover, that modeling by Mr. Kupper was thoroughly discredited, and the ALJs so found in their original PFD.[22]

Instead, in the language that LBEC quotes from the PFD, the ALJs were referring to Mr. Jamieson's review of the new air modeling by Mr. Ellis that LBEC submitted in connection with the 2010 proceedings. Similarly, Mr. Jamieson in 2010 was reviewing Mr. Ellis's air modeling, not the discredited and long-disregarded testimony of Mr. Kupper.

Furthermore, and contrary to what LBEC suggests, Mr. Jamieson did not find LBEC's air modeling to be "acceptable." Quite the opposite: as the ALJs expressly found, "Mr. Jamieson did not make such a finding [that LBEC's modeling was acceptable]."[23] Rather, Mr. Jamieson found LBEC's air modeling – the air modeling under consideration, not the discredited modeling done earlier by Mr. Kupper – to contain many "inconsistencies and deficiencies."[24] Indeed, the

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[20] *See* LBEC Exceptions at p. 12.
[21] *Compare* PFD (Dec. 1, 2010) at pp. 23-24 *to* LBEC Exceptions at p. 12.
[22] PFD (Mar. 29, 2010) at p. 120 ("numerous aspects of LBEC's air modeling were simply inadequate and provide insufficient assurance that the permits, if issued, would comply with all applicable air quality standards and be protective of human health and the environment.")
[23] PFD (Dec. 1, 2010) at p. 24.
[24] *E.g.*, Transcript Vol. 12 (Oct. 20, 2010), pp. 2882-83 (Jamieson testimony).

ALJs found as a matter of fact that Mr. Jamieson determined LBEC's air modeling to be "deficient."[25]

Thus, the ALJs properly concluded that Mr. Jamieson had no justification for proceeding to making the Applicant's demonstration himself.

D. Without the ED's assistance, the permit could not be granted.

The Applicant concludes its Exceptions mostly by congratulating itself for submitting its own air modeling, rather than Mr. Jamieson's, at the second hearing.[26] Such confidence is, however, completely misplaced. Both Mr. Jamieson and Mr. Hamilton testified that the Applicant's air modeling was insufficient.[27] Moreover, the ALJs found as a matter of fact that the Applicant's air modeling was insufficient:

> After considering the evidence and arguments presented, both on remand and at the original hearing, *the ALJs conclude that LBEC's air modeling is still deficient and, by itself, will not support the granting of the application, because LBEC has not made the showing required ....*[28]

III. Conclusion

For the reasons stated above, the Cities respectfully request that the exceptions of the ED and LBEC be rejected.

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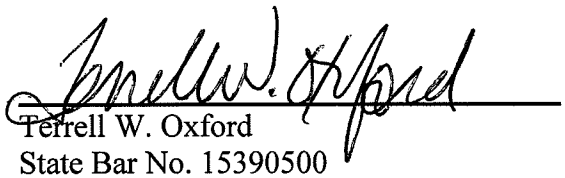
[25] PFD (Dec. 1, 2010) at pp. 24-25.
[26] *See* LBEC Exceptions at pp. 22-26.
[27] *See* pp. 1-2 *supra*.
[28] PFD (Dec. 1, 2010) at p. 3 (emphasis added).

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: 

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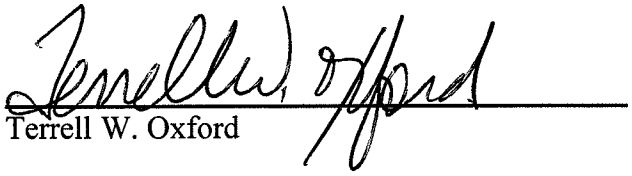
This is to certify that on this the 3rd day of January, 2011, a true and correct copy of the above and foregoing instrument was properly forwarded to all persons listed on the attached Mailing List via electronic mail and U.S. Mail.



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

December 21, 2010

OFFICE OF
AIR AND RADIATION

Bryan W. Shaw, Ph.D., Chairman
Texas Commission on Environmental Quality
P.O. Box 13087 (MC 100)
Austin, TX 78711

Dear Dr. Shaw:

I am writing to notify you of certain actions that the U.S. Environmental Protection Agency (EPA) anticipates taking on or about December 23, 2010, to ensure that as of January 2, 2011, businesses in Texas will be able to obtain, in a timely way, federal air construction and operating permits meeting the requirements of the Clean Air Act.

As you know, the Clean Air Act allows states to implement certain elements of the federal Clean Air Act, one of which is the Prevention of Significant Deterioration (PSD) permitting program for major sources of federally regulated air pollutants. TCEQ has been implementing an EPA-approved PSD program since 1992. Beginning on January 2, 2011, greenhouse gases will become newly regulated air pollutants under the Clean Air Act. On December 10, the D.C. Circuit Court confirmed that EPA's greenhouse gas regulations shall remain in effect and enforceable pending completion of judicial review. Therefore, it is incumbent on EPA to take action now to ensure that permitting authorities have the ability to issue, and covered sources the ability to obtain, the necessary permits beginning on January 2. Specifically, the Act requires that sources emitting greenhouse gases over certain quantities must obtain a PSD preconstruction permit for their emissions of those pollutants. EPA has been in communication with most, if not all, state and local air permitting agencies, including the TCEQ, over the past year to ensure that those agencies will be in a position to issue PSD permits for greenhouse gases or, if not, a federal plan is in place so as to avoid delays for businesses wishing to build new or expand existing sources.

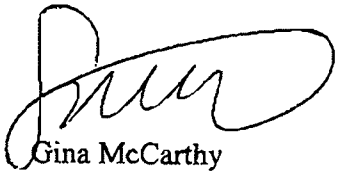
Earlier this month, EPA issued a final rule with a determination that the permitting programs for thirteen states, including Texas, are not adequate because they do not apply PSD to greenhouse gas emissions. "Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call; Final Rule," 75 Fed. Reg. 77698 (Dec. 13, 2010). In that final rule, EPA also included a "SIP call" requiring these state agencies to revise their PSD state implementation plans (SIPs) to include greenhouse gases, and EPA established deadlines for the states to submit their revised plans. EPA gave each affected state an opportunity to select a deadline of up to 12 months to submit its revised plan. TCEQ did not select a deadline, and as a result, EPA was required to establish the default deadline of December 1, 2011. However, state

officials in Texas have made clear, in letters to EPA Administrator Lisa P. Jackson, in statements in the media, and in legal challenges to EPA's greenhouse gas rules, including the recent challenge to the SIP Call rule, that they have no intention of implementing this portion of the federal air permitting program. As a result, absent further action, certain industrial facilities in Texas that emit large amounts of greenhouse gases will not have available a PSD permitting authority when they become subject to PSD requirements on January 2, 2011. TCEQ has estimated that some 167 projects could be affected next year. Based on this information, EPA noted in the SIP Call rule "We are planning additional actions to ensure that [greenhouse gas] sources in Texas can be issued permits as of January 2, 2011." 75 Fed. Reg.77700.

The unwillingness of Texas state officials to implement this portion of the federal program leaves EPA no choice but to resume its role as the permitting authority, in order to assure that businesses in Texas are not subject to delays or potential legal challenges and are able to move forward with planned construction and expansion projects that will create jobs and otherwise benefit the state's and the nation's economy. To effectuate this promptly, so that there will be no period of time when sources are unable to obtain necessary PSD permits, EPA intends to promulgate a partial disapproval of Texas' PSD program and a Federal Implementation Plan, to take effect by January 2, 2011.

Although EPA will be the greenhouse gas permitting authority on January 2, 2011, I want to emphasize that EPA would prefer that TCEQ act as the permitting authority for greenhouse gas-emitting sources in Texas, as it does for all other sources. I would be pleased to discuss with you steps that TCEQ could take to address the inadequacy in its PSD program and take over the greenhouse gas permitting function, as soon as possible after January 2, 2011, either through a revision to the PSD SIP that EPA could approve expeditiously or through a delegation agreement.

Sincerely,



Gina McCarthy
Assistant Administrator